

NTSB Order No. EA-5167

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of June, 2005

Respondent.

Docket SE-17110

Respondent has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued on November 4, 2004, after an evidentiary hearing.¹ In that decision and order, the law judge affirmed the Administrator's

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emergency² order revoking respondent's airline transport pilot certificate for violating 14 C.F.R. 91.17(a)(4),³ and revoking his first-class medical certificate for failure to meet the medical standards set forth in 14 C.F.R. 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3).⁴ The emergency order of revocation alleged that, on March 27, 2004, respondent attempted to act as first officer on Aloha Airlines flight 441 from Oakland, California, to Honolulu, Hawaii, when he had a blood alcohol concentration of .182 and .179 according to Breathalyzer tests conducted at 9:14 a.m. and 9:16 a.m., respectively. As further discussed below, we deny respondent's appeal and affirm the Administrator's order of revocation.

Respondent was assigned to serve as first officer on Aloha Airlines flight 441, which was scheduled to depart from Oakland,

² Respondent waived the applicability of the accelerated time limits associated with emergency proceedings.

³ Section 91.17(a)(4) states that no person may act or attempt to act as a crewmember of a civil aircraft while having .04 percent by weight or more alcohol in the blood.

⁴ These three sections pertain to first-, second-, and third-class medical certificates, respectively, and contain identical language, requiring no substance abuse within the preceding 2 years. "Substance abuse" is defined as:

Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds—

(i) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or

(ii) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.

California, at 9:05 a.m. on March 27, 2004. On March 25 he had served as first officer on an Aloha flight from Honolulu to Oakland. He and the rest of the crew had a two-night layover at a local hotel.

On the morning of March 27, respondent did not appear at the appointed 7:20 a.m. departure time from the hotel. According to the captain's written statement,⁵ the captain telephoned respondent's room several times and also knocked on respondent's door, but got a recording saying the telephone was in use. He then asked hotel security for assistance; a security officer spoke to respondent through his hotel door and asked respondent to call the captain at the front desk. When respondent did not call, the captain asked the hotel staff to tell respondent to take a cab to the airport, and the captain and the rest of the crew departed the hotel at 7:45 a.m.

At approximately 8:30 a.m., respondent passed through a Transportation Security Administration (TSA) security checkpoint at the Oakland Airport. TSA screeners from this checkpoint reported to their supervisor that a pilot in an Aloha Airlines first officer uniform smelled very strongly of alcohol. Two police officers then followed respondent to gate 11 where he had been seen entering the jetway to flight 441. One of the police

⁵ The captain's written statement was contained in his sworn affidavit and the attached "Irregularity Report" that the captain filed with Aloha Airlines after the incident. Both were admitted as Exhibit C-4. The affidavit indicated he was unavailable to testify at the hearing because of long-standing plans for an

officers testified at the hearing that, when he first confronted respondent at gate 11, he noticed respondent smelled strongly of alcohol, was very nervous, had watery red eyes, and did not speak clearly. According to the police report prepared by the officer, respondent told them he was "working ... flight 441 to Hawaii." (Exhibit C-3 at p. 3.)

Respondent asked the police officers if he could visit the restroom. After he had stayed in the restroom for an extended period, the police officers summoned their supervisor, Sergeant Larry Krupp. When Sergeant Krupp arrived at gate 11, he and the other officers saw respondent lean out of the restroom door and then go back into the restroom. (Transcript (Tr.) 78.) Sergeant Krupp then entered the restroom and told respondent to come out, which respondent did. Sergeant Krupp testified that he stood within one foot of respondent and could smell the strong odor of alcohol emanating from his breath and body. Sergeant Krupp also observed that respondent had flushed, red skin, and bloodshot eyes.

Respondent was next escorted to the police department office, where he was given Breathalyzer tests at 9:14 a.m. and 9:16 a.m. The results, which indicate blood alcohol concentration by weight, were .182 and .179, respectively. The Breathalyzer tests were administered by a sheriff from the

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overseas vacation at the time of the hearing.

Alameda County Sheriff's Office.⁶ The sheriff testified that he had received 3-4 hours of instruction in how to operate the machine and, prior to March 27, 2004, had successfully administered hundreds of tests. He testified that the machine tests itself before every use, and a zero reading on this self-test verifies that there is no alcohol in the machine. He also testified that the machine had been periodically calibrated (that is, tested for accuracy), using an alcohol test solution of .082, and that the results had always been within the manufacturer's tolerances. A printout of every test and check run on the machine since it was acquired by the Alameda County Sheriff's Office in May 2002 (Exhibit C-6) showed that the most recent calibration before the tests administered to respondent was performed on October 5, 2003.⁷ The results of that test, as well as the results of a calibration check performed on April 1, 2004 (5 days after the tests administered to respondent) were within the manufacturer's specified tolerances.

The Administrator also presented a memorandum from the federal air surgeon, and testimony from a deputy regional flight surgeon indicating that attempting to act as a crewmember with a

⁶ Because none of the testing units used by the Oakland Police Department were immediately available, Sergeant Krupp contacted the Alameda County Sheriff's Office, which also had a facility at the airport, and made arrangements to use their testing unit.

⁷ The Operators Manual states that most machines, "hold calibration for months. However, performing an accuracy check once a week during the first month the unit is in use will establish the new instrument's stability and increase the

blood alcohol concentration as recorded on the Breathalyzer tests constituted the misuse of a substance under sections 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3). Accordingly, these FAA medical officials concluded that respondent was not qualified to hold an airman medical certificate. (On appeal, respondent does not specifically address the revocation of his medical certificate.)

Respondent testified that on March 26 he stayed in his hotel room most of the day, but went to the hotel restaurant "around happy hour" where he had a meal and "approximately 5 beers." He stated he was in the restaurant from 5:30 p.m. to about 10:30 p.m. and then went to bed. He testified that he was awakened the following morning by hotel security knocking on his door and informing him he had missed the crew van. Respondent stated, "I threw all my stuff in a bag. I jumped into the - my old uniform and I didn't shave, shower, brush my teeth, anything, I just made a beeline for the taxi.... I was late." (Tr. 156.) Respondent also testified that he was suffering from symptoms similar to food poisoning, and that he had also felt ill the previous day, but was hoping it would pass. He stated that his intent was to inform the captain of this, and to ask if a jump-seating pilot could take his place as first officer of flight 441.

Respondent testified that upon arrival at the airport he did not check in with Aloha Airlines dispatch or flight operations

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operator's confidence in its accuracy."

personnel, and that he did not enter the airplane at any time. He acknowledged that he put his flight bag down in the jetway just outside the airplane and then walked from the jetway down to the ramp and gave his personal luggage to the baggage handlers. He stated that he looked for the captain on the ramp, thinking he might be conducting the preflight inspection. He then looked up and saw the captain in the cockpit giving him a "thumbs up" and motioning for him to come up. Respondent stated he waved back at the captain, but disputed the captain's interpretation of this exchange of gestures as a request from respondent for the captain to turn on the lights so respondent could conduct a pre-flight inspection.⁸ Upon re-entering the jetway from the ramp, respondent was intercepted by the police officers. Respondent admitted that he never spoke with the captain that morning and did not report that he was sick.

The law judge found that the preponderance of the evidence established that respondent reported to the airport with the intent of fulfilling his assignment as the first officer of the flight. Regarding respondent's motion to exclude the captain's written statement from evidence, the law judge noted that it was a sworn affidavit and was, therefore, entitled to some weight. However, he noted that there was sufficient evidence, even

⁸ In his written statement, and in a conversation with the Aloha Airlines station manager (who testified to this at the hearing), the captain stated that respondent motioned to him from the ramp to turn on the lights so respondent could conduct a preflight inspection.

without the captain's statement, to establish that respondent had attempted to act as first officer. He rejected respondent's claim that he had intended to report to the captain that he was ill, noting that this was inconsistent with respondent's reported statement to the police officers that he was "working flight 441 to Hawaii." The law judge observed that at no time did respondent tell the police officers that he was sick or contest the results of the Breathalyzer tests.

Regarding the validity of the Breathalyzer test results, the law judge found that there was no evidence that the machine was in anything other than working order. He further noted that the eyewitness testimony about respondent's odor and appearance corroborated the Breathalyzer test results. Accordingly, the law judge found that respondent had violated section 91.17(a)(4), and upheld the order of revocation.

On appeal, respondent argues, as he did to the law judge, that (1) he did not check in with the captain, conduct a preflight inspection, or otherwise attempt to act as a crewmember; (2) the law judge erred in admitting the captain's affidavit into evidence because respondent was thereby denied the opportunity to cross-examine him; and (3) the law judge erred in admitting the Breathalyzer test results because the machine was not calibrated as frequently as required by California law.⁹ We do not agree with any of these arguments.

⁹ The Administrator has filed a reply brief.

Respondent's actions on the morning of March 27, 2004, indicate that he was attempting to fulfill his assignment to serve as first officer on flight 441. Although he claims to have woken up sick that morning, he did not notify the captain or anyone else of this while he was at the hotel, as might be expected of a pilot who realized on the morning of a scheduled flight that he would not be able to work. Instead, by his own account, respondent rushed to the airport and reported to his assigned gate. As the Administrator points out in her reply brief, if respondent had really intended to report his illness to the captain, he would have immediately looked for him at the gate in the place he most likely would have been - in the cockpit. Instead, respondent left his flight bag by the door to the aircraft and walked down onto the ramp where he waved to the captain in the cockpit. Regardless of whether this gesture was, or should have been, interpreted as an attempt to do a pre-flight inspection, respondent's subsequent statement to the police officers that he was "working flight 441," and his failure to mention to them that he was ill, strongly contradict his claim that he had intended to report to the captain that he was sick and could not operate the flight. Thus, even without considering the captain's written statement, we find no reason to overturn the law judge's credibility determination rejecting this claim.

Nonetheless, we find no error in the law judge's admission into evidence of the captain's affidavit and attached irregularity report. Respondent's inability to cross-examine the

captain is relevant only to the affidavit's weight, not its admissibility. Our rules provide that all material and relevant evidence, including hearsay, is admissible. In any event, respondent is incorrect in asserting that whether or not respondent attempted to conduct a preflight inspection was a "critical factor" in the case, and that the law judge gave this affidavit, "considerable weight in his determination that the respondent 'attempted' to act as a crewmember.'"¹⁰ The law judge explicitly stated, and we agree, that, "even without that statement ... there's sufficient evidence to establish that the Respondent did in fact attempt to act as the assigned first officer for flight 441. The statement of [the captain] ... adds further weight to that conclusion."

Finally, we are not persuaded that the reliability or accuracy of the Breathalyzer machine is questionable merely because it was not calibrated every 10 days, as reportedly called for by California law. We are not bound by California law. More importantly, respondent has presented no evidence suggesting that the machine did not provide accurate results when it was used to test respondent on March 27, 2004. Indeed, the evidence overwhelmingly supports the opposite conclusion. Respondent admits consuming alcohol the evening before. The last calibration before respondent's test yielded an accurate result well within the manufacturer's specified tolerances. Despite the

¹⁰ Respondent does not challenge any of the other statements

fact that 5 months elapsed between this check and the tests of respondent, there is no evidence that the machine's accuracy was degraded over that 5-month period. Indeed, a calibration check conducted just a few days after respondent's test confirmed that it was still properly calibrated. Further, the manufacturer's operating manual makes clear that the machine "holds calibration for months."

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order of revocation and the law judge's initial decision are affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

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in the captain's affidavit or attached irregularity report.